

DIAGEO

September 26, 2005

Mr. Francis W. Foote
Director, Regulations & Procedures Division
Alcohol & Tobacco Tax & Trade Bureau
Box 14412
Washington, DC 20014

Re: Notice 41 – Labeling and Advertising of Wines, Distilled Spirits and Malt Beverages

Dear Mr. Foote:

Diageo plc, Diageo North America and DIAGEO-Guinness U.S.A., Inc. (collectively “Diageo”) hereby submit comments on Alcohol & Tobacco Tax & Trade Bureau (“TTB or “Bureau”) Notice 41, Labeling and Advertising of Wines, Distilled Spirits and Malt Beverages (“Notice 41” or “Notice”), 70 Fed. Reg. 22274 (April 29, 2005). Our comments focus on our position on voluntary serving facts labeling – a position of great importance to our company and one on which we have pro-actively engaged your agency since early 2004. We firmly believe that alcohol beverage suppliers, consistent with the Federal Alcohol Administration Act and current TTB regulations, may, if they so choose, include serving facts, including serving size, calories, carbohydrates, fat, protein and alcohol content per serving, and the number of servings per container on their labels.

The inclusion of this information on labels should be permitted as truthful and accurate non-misleading “additional information.” [See 27 CFR subsections 4.38(f), 5.33 (f), and 7.28(e), respectively, for wines, distilled spirits and malt beverages.] Accordingly, we respectfully request the TTB issue Certificates of Label Approval (COLA’s) for labels bearing this “additional information” pending completion of this rulemaking.

Diageo endorses the comments that are being filed by DISCUS in response to Notice 41. However, the following comments, while broadly consistent with DISCUS comments, amplify upon the issues of voluntary serving facts panels.

As the Bureau well knows, Diageo has sought voluntarily to put a serving facts panel on our brand labels for close to two years. We support a voluntary approach to serving facts labeling because we recognize that some suppliers, particularly small-scale ones, might have difficulty devoting the resources to the analysis, design and printing costs that may be incurred.

The following comments explain our public policy rationale, the regulatory grounds and our firm belief in our legal right to place voluntary serving facts panels on our labels (see example of draft Smirnoff Serving Facts panel below). These comments also address the principal concerns raised by a minority of industry members who oppose Diageo's approach to voluntary serving facts panels. Finally, as noted above, Diageo believes that TTB currently has the authority to grant COLAs that contain serving facts panels and respectfully requests that the Bureau do so pending completion of this rulemaking since the addition of a serving facts panel to labels clearly would not be misleading. We do not believe that the addition of a truthful and factual serving facts panel to our labels would be misleading.

SMIRNOFF®	
Serving Facts	Amount Per Serving
Serving Size 1.5 fl oz	Calories 97
Servings Per Container 17	Fat 0g
	Carbohydrates 0g
	Protein 0g
	Alcohol 0.6 fl oz

Public Policy -- More Factual Information is Better

Diageo believes that public policy is best served when consumers have more – rather than less – factual information. We recognize that consumers want to make informed choices about what they drink on the basis of facts. As a responsible and responsive company, our policy approach to labeling is to provide our consumers with product information that is accurate, aligned with government policy and consistent across beverage categories.

In fact, research shows that consumers appreciate more factual serving facts information on alcohol beverage labels. A Westhill/Hotline poll from June 2005 found that 83% of all respondents thought that alcohol companies should be allowed to disclose on their labels how much alcohol is in a standard serving. [See Exhibit A] A 2003 poll from National Consumers League and Center for Science in the Public Interest, which was attached to the NCL/CSPI petition, found that 94% either strongly agreed or agreed that labels should be required to list alcohol content, and 84% supported requiring serving size information.

Diageo has been working on developing a global alcohol beverage information policy for over two years and formally launched its new policy on July 1, 2005. This new policy applies to all Diageo-owned alcohol beverage brands, including beer, wine and spirits, in all markets around the world. More than 10,000 packaging variations across spirits, beers and wines are being implemented over a 5 year period to provide consumers with details on serving size, nutrient information, allergens, and alcohol content, where permitted by law, and, in addition, we are including a responsible drinking message to remind adults of the importance of responsible drinking.

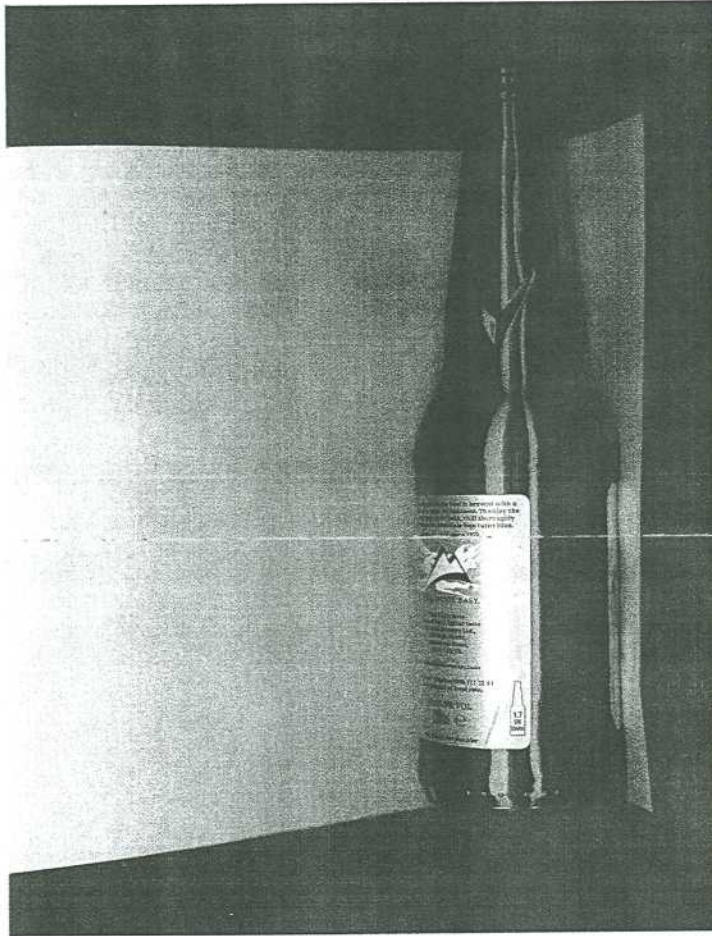
Diageo was working on this global policy over two years ago when in the United States, the National Consumers League and the Center for Science in the Public Interest, filed their joint petition to the TTB in December 2003 calling for mandatory disclosure of percent alcohol, standard servings size, alcohol per serving, calories per serving,

ingredients, number of standard servings per container, and U.S. Dietary Guidelines advice on moderate drinking for women and men on all beverage alcohol labels.

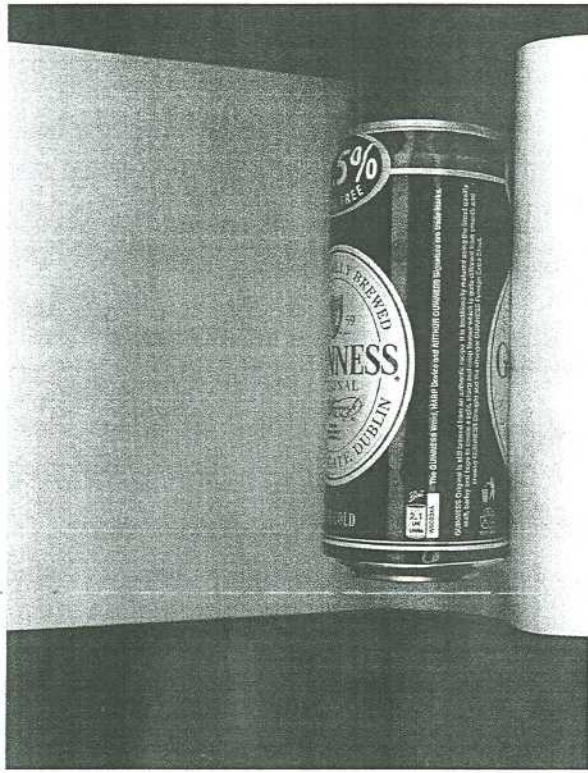
Diageo and other members of the U.S. beverage alcohol industry are already familiar with both voluntary and mandatory labeling schemes in other major English-speaking countries that call for disclosure of some of the information on the proposed serving facts panel, such as standard drink and alcohol content information.

For example, in 1999, in the United Kingdom, Diageo and other alcohol beverage companies agreed to a voluntary scheme for unit labeling. This information is designed to help consumers follow UK Government Guidelines on Sensible Drinking. [See Exhibit B] Other companies involved in the voluntary scheme are: Bacardi Brown Forman Brands, Coors, Carlsburg UK, InBev, Pernod Ricard and others. Examples of such voluntary labeling in the UK from Coors and Guinness are enclosed. [See Exhibit C]

Coors Unit Labeling in UK



Guinness Unit Labeling in UK



In Australia and New Zealand, all alcohol beverage manufacturers adhere to government-mandated standard drink labeling, which became effective in 1995. This labeling scheme was designed to make it easier for the government to communicate its responsible drinking guidelines to consumers. In 2004, Diageo led an effort to better communicate with its consumers this important information, and shared a new label graphic with any interested competitors. An example of this label is enclosed. [See Exhibit D]

Smirnoff Standard Drink Label--Australia



As for the ANPRM's question regarding harmonization of its alcohol beverage labeling regulatory requirements with those of other major producing nations, we do not believe such harmonization should be undertaken at this time. While we support the concept of harmonization of regulatory requirements with those of other major producing nations, we feel that due to the complexities and existing differences in current specific national regulatory requirements, significant further study would be required to develop an approach, logic and policy for US application.

Given our international experience and our global policy approach toward labeling, Diageo responded favorably to parts of the petition submitted by the National Consumer League and Center for Science in the Public Interest. On December 17, 2003, Diageo issued a press release announcing our intention to begin providing American consumers with voluntary product information including: serving size information, servings per container, and calorie, carbohydrate, fat, protein and alcohol content per serving. [See Exhibit E]

In March 2004, we began a series of open and transparent discussions with TTB staff in an effort to meet our policy commitment to our consumers. These meetings and discussions continued until the issuance of the ANPRM in April of 2005. The rules that

guided our approach and which we shared with TTB were: 1) voluntary placement of TTB-approved “Serving Facts” panel in primary packaging and consumer product information sources by late summer 2004; 2) adherence to Nutrition Labeling and Education Act of 1990 (NLEA) guidelines as appropriate for alcohol beverages; 3) compliance with appropriate regulations and direction from US regulatory authorities; 4) forbearance from using “Serving Facts” panel in any promotion or advertising in a manner that would seem to promote any health claims or benefits; 5) provision of information on standard drink comparisons across all beverage types. We made a series of changes recommended by TTB staff and believe that the “final” labels described by TTB in both its August and October White Papers are well considered, consumer-friendly, highly informative, and consistent with US government policies on moderate alcohol consumption. The many comments on the White Papers submitted by the public health community agree. [See Exhibit F]

Furthermore, we know from monitoring our “customer care” telephone calls over the last twelve months that 23 percent of the 15,694 calls that we received relating to product inquiries were asking for information on nutrient values. The number of calls per month requesting this type of information is increasing.

In June 2005, Diageo set up a website, “KnowYourDrink.com” to inform our consumers about the Advance Notice of Proposed Rulemaking and the public comment period. [See Exhibit G] The site also educated consumers about the issue of voluntary serving facts labeling on spirits, wine and beer. Most Americans do not read the Federal Register, so Diageo felt it was important to share our proposal with those we know drink our brands.

There was an impressive response rate and level of interest in the website. The site demonstrated once again how many people believe that serving fact information should be readily available on the labels of beverage alcohol products. As of September 23, 2005, over 18,000 consumers have sent emails to the TTB in support of Diageo’s serving fact panel via KnowYourDrink.com.

Diageo's approach toward labeling is consistent with the views of many public health experts and advocates. In fact, numerous policymakers have advocated that the industry voluntarily label its products with serving size, alcohol content per serving, caloric and similar information. For example, in 2003, two former Secretaries of Health and Human Services (Joseph Califano and Louis Sullivan) and two former Surgeons General (Julius Richmond and David Satcher) jointly called for voluntary industry labeling of this type of information. And the response to the first TTB White Paper on Labeling was widely supported by public health experts and groups. (See Exhibit F)

Consistency Across Alcohol Beverage Categories

Diageo also believes that public policy toward beverage alcohol labeling needs to be consistent across all categories of alcohol. Current labeling regulations are an outgrowth of historical anomalies. A modernized, consistent labeling regime would better serve American consumers – the majority of whom consume across all categories, spirits, beer and wine. Diageo is one of only a few companies in the United States that produces and markets leading brands of distilled spirits, wine and malt beverages. Our wine company, Diageo Chateau and Estates, one of the fastest growing wine companies in the U.S. Diageo also sells two of the oldest beer brands in the world, and our distilled spirits division is the largest in the world. As such, we have ensured that our approach is consistent across categories so that consumers of our brands can make comparisons both within and across categories with regard to calories, macronutrients and alcohol content on a per serving basis.

Current labeling law is inconsistent both across and within alcoholic beverage categories. For example, alcohol content labeling is mandatory for spirits, flavored malt beverages and wines over 14 percent alcohol by volume. Yet it is not required for all malt beverages and wines under 14% alcohol by volume. Wines under 7% are governed by FDA regulations and are required to carry a NLEA label.

Diageo notes that more recent labeling regulation and legislation, such as the health warning labels, apply equally to all alcohol beverage products. This is appropriate government consumer public health policy, as health effects are related to the amount of alcohol consumed, not the type of alcohol product consumed. Diageo also applauds TTB's recent requirement, established in 2004, for flavored malt beverages to carry alcohol by volume labeling. As stated in the FMB final rule:

To avoid consumer confusion over the alcohol content in flavored malt beverages, we proposed the addition of a new paragraph (a) (5) in § 7.22, (27 CFR 7.22) setting forth a mandatory requirement to state on the brand label the alcohol content of any malt beverage that contains any alcohol derived from added flavors or other ingredients containing alcohol. We suggested that this requirement would help consumers identify these products as alcohol beverages and would help consumers to understand that their alcohol content is similar to that of traditional malt beverages. This alcohol content labeling would also draw attention to any flavored malt beverages that might lie outside the customary 4 to 6 percent alcohol by volume range for malt beverages. For example, if a flavored malt beverage contained 10% alcohol by volume, alcohol content labeling would inform consumers about this important fact. (FR, Vol 70, No. 1, January 3, 2005, p. 194)

However, many traditional malt beverage labels do not display ABV. Thus, a consumer cannot currently compare alcohol contents as TTB deemed important in the FMB rule above.

Factual Information

Our labeling policy is also based on using established rules and definitions utilized by the U.S. government. That is why Diageo selected a format similar to, although still fundamentally different from, NLEA. Most American consumers recognize a box format and understand that it contains nutrient information about a serving of that

product. Importantly, however, Diageo changed the name from “nutritional facts” to “serving facts;” eliminated the % Daily Value column, and listed only macronutrients and alcohol content to limit any misperception that our labels were making health or nutrition claims. All of these changes were supported by TTB staff during informal discussions leading up to the issuance of the first TTB White Paper.

In seeking to align our approach with established government definitions, Diageo selected a standard serving size as endorsed by U.S. federal government agencies. The major U.S. government agencies with a role in alcohol policy all publicize and teach the fact that a standard serving (12 ounces of regular beer, 5 ounces of table wine, 1.5 ounces of 80-proof spirits) each contains the same amount of alcohol, 0.6 ounces.¹ This same fact is publicized and promoted by authoritative medical, public health and advocacy groups as well.² For example:

- Departments of Agriculture and HHS: *Dietary Guidelines for Americans* (2005): “The majority of American adults consume alcohol. Those who do so should drink alcoholic beverages in moderation. Moderation is defined as the consumption of up to one drink per day for women and up to two drinks per day for men. Twelve fluid ounces of regular beer, 5 fluid ounces of wine, or 1.5 fluid ounces of 80-proof distilled spirits count as one drink for purposes of explaining moderation. This definition of moderation is not intended as an average over several days but rather as the amount consumed on any single day.” (p. 44) We note the Dietary Guidelines have used this definition since 1985. [See Exhibit H]
- TTB Ruling 2004-1: “Held further, the statement of average analysis required on labels and in advertisements may be stated per container size only if the container is equal or less than a serving size. Otherwise, the analysis must be stated per

¹ See also Department of Education’s Higher Ed Center on Alcohol and Other Drug Abuse [Exhibit I]; National Institute on Alcohol Abuse and Alcoholism: *The Cool Spot, “Facts about Alcohol”* [Exhibit J]

² See MADD *Responsible Marketing Guidelines* (www.madd.org/activism/0.1056.1621.print.00.html, accessed 9/21/05) [Exhibit K]; American Dietetic Association *Nutrition Fact Sheet* (2001); American Medical Association: *JAMA Patient Page*, Jan 6, 1999) [Exhibit L];

serving size, and must specify as part of the analysis that a single serving is 12 fl. oz. for malt beverages; 5 fl. oz. for wine; and 1.5 fl. oz. for distilled spirits.” (p. 7) [See Exhibit M]

- National Institute on Alcohol Abuse and Alcoholism (NIAAA), *Helping Patients who Drink Too Much: A Clinician's Guide* (2005): “What is a standard drink? A standard drink is any drink that contains about 14 grams of pure alcohol (about 0.6 fl oz, or 1.2 tablespoons). Below are standard drink equivalents. (Appendix, p. 14) [See Exhibit N]
- NIAAA: *Alcohol: What you don't know can harm you* (1999): “What is a drink? A standard drink is: One 12-ounce bottle of beer*, One 5-ounce glass of wine, 1.5 ounces of 80-proof distilled spirits (*Beer ranges considerably in its alcohol content, with malt liquor being higher in its alcohol content than most other brewed beverages)” (p. 1) [See Exhibit O]

NIAAA: “What You Don’t Know Can Harm You”

If you are like many Americans, you may drink alcohol occasionally. Or, like others, you may drink moderate amounts of alcohol on a more regular basis. If you are a woman or someone over the age of 65, this means that you have no more than one drink per day; if you are a man, this means that you have no more than two drinks per day. Drinking at these levels usually is not associated with health risks and can help to prevent certain forms of heart disease. But did you know that even moderate drinking, under certain circumstances, is not risk free? And that if you drink at more than moderate levels, you may be putting yourself at risk for serious problems with your health and problems with family, friends, and coworkers? This booklet explains some of the consequences of drinking that you may not have considered.

WHAT IS A DRINK?

A standard drink is:

- One 12-ounce bottle of beer* or wine cooler
- One 5-ounce glass of wine
- 1.5 ounces of 80-proof distilled spirits.

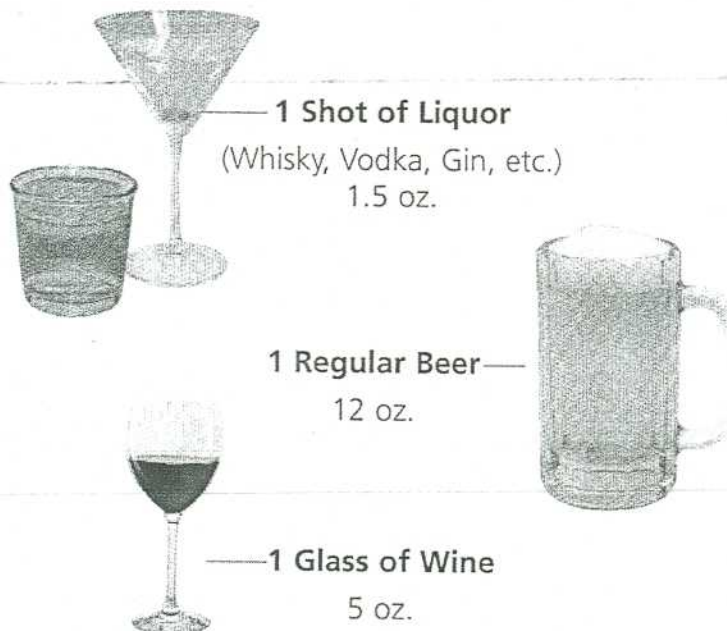
*Beer ranges considerably in its alcohol content, with malt liquor being higher in its alcohol content than most other brewed beverages.

- National Highway Traffic Safety Administration and American College of Emergency Room Physicians: *Alcohol: How much is too much?* “What is a standard drink? One shot of liquor (whiskey, vodka, gin) 1.5 oz; One regular beer (12 oz); One glass of wine (5 oz)” [See Exhibit P]

NHTSA: “Alcohol: How Much Is Too Much?”

What is a standard drink?

A standard drink is...



Finally, more than 70% of state driver's license manuals provide this information in sections dealing with alcohol consumption and driving. [See Exhibit Q]

Industry Response

We understand that some of our fellow industry members may oppose aspects of the voluntary Serving Facts panel that TTB has under consideration, especially the listing of serving size and alcohol per serving. They reportedly allege that providing

information on alcohol per serving would confuse consumers, and they question the fact of a “standard serving” on the grounds that distilled spirits, for example, may not always be measured accurately down to the fraction of an ounce. We recognize this latter assertion to be true on some occasions, but we believe this provides even more reason to provide alcohol per serving and standard serving information on the label – to provide a benchmark for consumers, to encourage more accurate measuring and usage, and to help consumers understand what the advice on moderate consumption in the *Dietary Guidelines* means to them.

There is indeed variability in the alcohol content of beer, wine and spirits and variability in the amount of different beverages in how they are cited in recipes or poured in retail establishments or at home. For example, beer can be served in a 20-ounce mug or in larger quantities when consumed from a keg. A Martini may use 3 ounces of spirits. This is precisely why consumers would benefit from standard serving and standard drink information on the label. A standard metric is required to measure deviations. The deviations demand the standard; they do not negate the need for it. For example, defining standard servings is not new to the food industry and was addressed by many packaged food companies whose products are consumed at significantly more variable rates than beverage alcohol. Furthermore, this is exactly the reason federal agencies and public health groups teach standard drinks: so that consumers have a metric for following federal advice on alcohol consumption.

Labeling research expert, James T. Heimbach, Ph.D., F.A.C.N. believes that the standard serving information and alcohol content per serving will be understood by consumers and is an important element of the serving fact panel. [See Exhibit R]

Some industry members also reportedly assert that “alcohol by volume” (ABV) has long been utilized on alcohol beverage labels and is more informative to consumers than alcohol per serving. We disagree. First, beer (except for flavored malt beverages) is not even required to list ABV. Second, there is a very large range of ABVs even within the beer category, ranging from 3.2%, to 8% for some malt liquors, to 25% for one new

product on the market. Alcohol content per serving directly informs the consumer. Using only ABV, a consumer who wants to determine how many drinks he or she is consuming would have to: 1) know how much alcohol is in a standard serving; 2) do a mathematical calculation (ounces x ABV); AND 3) compare the mathematical product he or she arrived at above with 0.6 fluid ounces of alcohol that is in a standard drink. TTB should approve alcohol per serving on labels so that this somewhat complicated operation does not have to take place: the work is already done and is on the label. Only with alcohol per serving will consumers easily be able to make comparisons of alcohol content per serving within and across beer, wine and spirits products. Indeed, without a standard serving, the other information provided on the Serving Facts panel is relatively meaningless.

Variability in alcohol content across all alcohol beverage products highlights the importance of providing standard serving and standard drink information on the container. Indeed, within both the beer and wine sectors, there has been notable movement toward higher alcohol content in recent years. According to news reports, wine varietals that even a few years ago were 12% ABV are now coming in at 15% ABV or higher as vintners leave grapes on the vine until they are “ultra ripe.”³ Also, according to Kerr, Brown and Greenfield, “...[S]ignificant shifts in the types of beer consumed by Americans have occurred over the past 15 years. ...Although much more of the beer consumed is lower in alcohol, mainly 4.2% ABV, there has also been a shift toward consumption of high-alcohol beers, with a proliferation of 5% ABV beers and a larger market for ice beers in the 5.5-5.9% range.”⁴ At the same time, there has been a proliferation of lower- and mid-proof spirits products.

To summarize, the Dietary Guidelines define moderate drinking as “up to two drinks a day for men and up to one drink a day for women.” Responsible consumers count drinks to monitor their own drinking and follow this guidance. Under current

³ WNBC-4 (Columbus OH): “Alcohol Content Higher in Wine,” 7/12/2005.

⁴ Kerr, Brown & Greenfield, “National and State Estimates of the Mean Ethanol Content of Beer Sold in the US and Their Impact on Per Capita Consumption Estimates: 1988-2001,” *Alcoholism: Clinical and Experimental Research*, Vol 28, No. 10, p. 1531-2 (Oct. 2004)

labeling regulations, comparisons of alcohol content per serving across beer, wine and spirits products are difficult, if not impossible where not even ABV label information is provided.

Regulatory Grounds

Factual serving facts information fits neatly and simply into the niche created by Section 105 (e) of the Federal Alcohol Administration Act (27 USC Sec. 101 et seq.), which confirms that labels for alcohol beverage products are to “provide the consumer with adequate information as to the identity and quality of the products.”

TTB for the past 25 years has recognized the permissibility of the disclosure on labels of calorie, carbohydrates, fat and protein per serving (see ATF Ruling 80-3) as amplified by TTB Ruling 2004-1 (April 7, 2004). [Footnote: While ATF Ruling 80-3 by its terms applied only to malt beverages, ATF applied the same standards set forth in that ruling in approving distilled spirits labels in the mid 1980's, e.g., Seagram's Mount Royal Light) which bore a label claim that it contained fewer calories than the company's regular whisky. Disclosing the amount of alcohol contained in the same standard serving is without doubt the most fundamental fact about an alcohol beverage that could ever be published.

First Amendment Rights

The question of the permissibility of disclosure of alcohol content information on labels was put to rest by the U.S. Supreme Court ten years ago in Rubin v. Coors, 514 U.S. 476 (1995). There the Court held a provision of the Federal Alcohol Administration Act abridging a brewer's right to provide the public with accurate information about the alcoholic content of malt beverages was unconstitutional. As the Court stated:

...the free flow of commercial information is "indispensable to the proper allocation of resources in a free enterprise system" because it informs the numerous private decisions that drive the system...Indeed, we observed

that a "particular consumer's interest in the free flow of commercial information ... may be as keen, if not keener by far, than his interest in the day's most urgent political debate."⁵

Similarly, in 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996), the Court held that a statutory prohibition against advertisements that provided the public with accurate information about retail prices of alcohol beverages was also unconstitutional. The Court's analysis in that case is also relevant here.

It is the State's interest in protecting consumers from "commercial harms" that provides "the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech."...Yet bans that target truthful, nonmisleading commercial messages rarely protect consumers from such harms...

Precisely because bans against truthful, nonmisleading commercial speech rarely seek to protect consumers from either deception or overreaching, they usually rest solely on the offensive assumption that the public will respond "irrationally" to the truth....The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good. That teaching applies equally to state attempts to deprive consumers of accurate information about their chosen products:

"The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented..."⁶

⁵ *Rubin v. Coors*, *supra* at 481-482 [quoting *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976)]

⁶ *44 Liquormart, Inc. v. Rhode Island*, *supra* at 502-503 (citations omitted).

The cases demonstrate that to preclude the disclosure of truthful information, the government must have a compelling state interest. The comments being received by TTB reflect that the compelling interest favors disclosure.

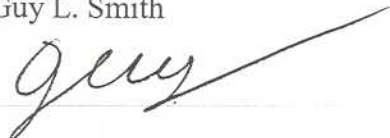
In March of this year, Diageo exercised its First Amendment rights under the veil of both cases cited above and placed advertisements containing a serving facts panel in *USA Today*, *Roll Call*, and *The Hill* newspapers. [See Exhibit S] TTB requested that the ad contain a Statement of Average Analysis (SAA). Diageo added an SAA for its next ad that ran in April 2005. On that day it was perfectly legal for everyone who spent fifty cents on a newspaper to get this information – but it is not allowed on the label.

Conclusion

Diageo appreciates the opportunity to comment upon the Bureau's advance notice. Please do not hesitate to call us if you have any questions concerning our comment.

Sincerely,

Guy L. Smith

A handwritten signature in cursive script, appearing to read "Guy", with a long horizontal stroke extending to the right.

Carolyn L. Panzer

A handwritten signature in cursive script, appearing to read "CP", with a large loop at the beginning and a long horizontal stroke extending to the right.